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SERVICE DATE - JANUARY 21, 1999

SURFACE TRANSPORTATION BOARD<sup>1</sup>

DECISION

No. 41113

TEMPLE-INLAND FOREST PRODUCTS CORPORATION F/K/A  
TEMPLE-EASTEX INCORPORATED--PETITION FOR  
DECLARATORY ORDER--CERTAIN RATES AND  
PRACTICES OF CONVAIRE INTERNATIONAL, INC.  
F/K/A WESTERN CARRIERS, INC.

Decided: January 15, 1999

By petition filed September 30, 1993, Temple-Inland Forest Products Corporation f/k/a Temple-Eastex Incorporated (Temple-Eastex or petitioner) seeks a determination resolving issues of rate reasonableness and rate applicability underlying the undercharge claims brought by Convaire International, Inc. f/k/a Western Carriers, Inc. (Western or respondent), a former motor common and contract carrier.<sup>2</sup> We find that Western was not a participant in the mileage guide referred to by its mileage rate tariff during the pertinent time period, and that, accordingly, under Security Services, Inc. v. Kmart Corp., 114 S. Ct. 1702 (1994) (Kmart), Western's common carrier mileage rates may not be applied to the shipments at issue. We also find that, in any event, recovery is barred by section 2(e) of the Negotiated Rates Act of 1993, Pub. L. No. 103-180, 107 Stat. 2044 (NRA).

BACKGROUND

This matter is before the Board on referral from the United States District Court for the Northern District of Texas, Dallas Division, in Convaire International, Inc. f/k/a Western Carriers,

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<sup>1</sup> The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICC Termination Act or the Act), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the Act provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the Act. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 13709-13711. Therefore, this decision applies the law in effect prior to the Act, and citations are to the former sections of the statute, unless otherwise indicated.

<sup>2</sup> Western filed a petition for bankruptcy under Chapter 7 of the Bankruptcy Code on June 12, 1990. Board records disclose that respondent held common carrier and contract carrier operating authority under Docket No. MC-135518 until they were revoked on May 14, 1990.

Inc. v. Temple-Eastex Incorporated, Civil Action No. 3:92-CV-1172-D. The court proceeding was instituted by Western to collect undercharges from Temple-Eastex in the amount of \$17,295.97 (plus interest) allegedly due, in addition to amounts previously paid, for services rendered in transporting 23 shipments of pulpboard between May 20, 1988, and February 22, 1989. The shipments were transported from Evadale, TX, to Yuma, AZ, Mundelein and Lincoln, IL, and points in California. By order entered May 5, 1993, the court stayed the proceeding and referred issues of rate reasonableness and rate applicability to the ICC for determination.

Pursuant to the court order, Temple-Eastex filed its petition for declaratory order requesting the ICC to resolve the court-referred issues. By decision served October 26, 1993, the ICC established a procedural schedule for the submission of evidence on non-rate reasonableness issues. By decision served January 3, 1994, the ICC established a second procedural schedule permitting the parties to invoke the alternative procedure under section 2(e) of the NRA, and to submit evidence and argument with respect to that provision. Petitioner filed its opening statement on January 18, 1994. Western failed to submit a reply, and indeed has failed to make an appearance or otherwise participate in any aspect of this proceeding.<sup>3</sup>

Petitioner asserts that the basis of respondent's claim for undercharges is that the applicable rates for the subject shipments are those set forth in Item 4000 of Tariff ICC WECJ 202-A rather than the charges originally billed by respondent. Temple-Eastex contends that the tariff relied upon by Western is dependent upon mileage and that the governing tariff is the Household Goods Carriers' Bureau (HGB) Mileage Guide.<sup>4</sup> Petitioner maintains that, because Western was not a common carrier participant in the HGB Mileage Guide at the time the subject shipments were transported, Tariff ICC WECJ 202-A is void and unenforceable. Petitioner further contends that the subject shipments were transported in contract carriage pursuant to a written transportation agreement entered into by the parties, that the rates respondent now seeks to assess are unreasonable, and that respondent's attempt to collect undercharges in this proceeding constitutes an unreasonable practice under section 2(e) of the NRA.

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<sup>3</sup> Under 49 CFR 1112.3, a party that fails to comply with the schedule for submission of verified statements is deemed to be in default and to waive any further participation in the proceeding. Western's failure to participate in this proceeding should bind it in the court proceeding to the record developed before the agency. See Carriers Traffic Serv. v. Toastmaster, 707 F. Supp. 1498, 1505-06 (N.D. Ill. 1988) (carrier on court referral must "live with the record it has made (or failed to make)" before the [Board] when pursuing its undercharge proceeding in the courts).

<sup>4</sup> Specifically, Mileage Guide No. ICC HGB 107 identifies Western solely as a contract carrier participant. Accordingly, Western cannot be viewed as a common carrier participant in the mileage guide tariff. See Anchor Glass Container Corporation--Petition for Declaratory Order--Certain Rates and Practices of Casket Distributors, Inc., No. 41132 (ICC served Dec. 29, 1994). Only common carrier services are subject to the filed rate doctrine that Western seeks to invoke.

## DISCUSSION AND CONCLUSIONS

A. Mileage Guide Issue. As discussed in detail in Jasper Wyman & Son et al.--Pet. for Declaratory Order, 8 I.C.C.2d 246 (1992) (Jasper Wyman),<sup>5</sup> Roberts & Dybdahl Inc.--Pet. for Declar. Order, 9 I.C.C.2d 193 (1992) (Roberts & Dybdahl), and Kmart, a carrier may not apply mileage rates whose computation depends upon distances listed in a tariff filed by another carrier or agent, unless that carrier is a participant in the distance tariff. In Kmart, 114 S. Ct. at 1706, the Court summarized the principle underlying this rule as follows:

The ICC has authority to “prescribe the form and manner” of tariff filing, § 10762(b)(1), and the information to be included in tariffs beyond any matter required by statute, § 10762(a)(1). Each carrier is responsible for ensuring that it has rates on file with the ICC. §§ 10702, 10762. Under ICC regulations, a carrier has some choice about the form in which to state its rates, one possibility being a rate based on mileage. A mileage rate has two components: the rate per mile and distances between shipping points. 49 CFR § 1312.30 (1993). A carrier may file the distance portion of the rate by listing in its own tariff the distance between all relevant points, by referring to a map attached to its tariff, or by referring to a separately filed distance guide, such as the HGCB Mileage Guide. § 1312.30(c)(1).... A carrier may refer to a tariff filed by another carrier or by an agent only by formally “participating” in the referenced tariff, which may be done only by issuing a power of attorney (or concurrence) to the other carrier or agent. 49 CFR §§ 1312.4(d); 1312.10; 1312.27(e) (1993). The Commission’s void-for-nonparticipation regulation provides that “a carrier may not participate in a tariff issued in the name of another carrier or an agent unless a power of attorney or concurrence has been executed. Absent effective concurrences or powers of attorney, tariffs are void as a matter of law.” § 1312.4(d).

Accord, Jasper Wyman; Wonderoast, Inc.--Transp. Systems International, Inc., 8 I.C.C.2d 272 (1992).<sup>6</sup>

As we noted in Jasper Wyman, 8 I.C.C.2d at 252-55, the HGB Mileage Guide tariff itself also prohibits a nonparticipant from using the HGB Mileage Guide. The Household Goods

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<sup>5</sup> Rev’d, Overland Express, Inc. v. ICC, 996 F.2d 356 (D.C. Cir. 1993), vacated and remanded, 114 S. Ct. 2095 (1994), in light of Kmart.

<sup>6</sup> Applied in Lovett v. Wonderoast, 145 B.R. 40 (Bankr. D. Minn. 1992).

Carriers' Bureau files a separate tariff, the "Participating Carrier Tariff," naming the carriers that are participants in the HGB Mileage Guide tariff. The HGB Mileage Guide tariff contains an express limitation in its applicability, excluding any carriers that are not listed in the Participating Carrier Tariff as participants in the HGB Mileage Guide. Specifically, the HGB Mileage Guide provides that a carrier may not use the HGB Mileage Guide "for the purpose of determining interstate transportation rates based on mileage or distance, unless [the] carrier is shown as a participant in the [HGB Mileage Guide]."

Western's claims for undercharges are based on mileage tariffs that are dependent upon the HGB Mileage Guide for the distance portion of its rates. As the record here clearly establishes, however, Western was not a common carrier participant in the HGB Mileage Guide at the time the shipments at issue moved. Because Western failed to participate as a common carrier in the HGB Mileage Guide during the pertinent time period, pursuant to 49 CFR 1312.4(d), its common carrier tariff rates that relied on the HGB Mileage Guide were void for nonparticipation. In the absence of an effective means to determine distance, Western's mileage tariff rates cannot be applied. Consequently, respondent's claim for undercharges against petitioner is not supported by the terms of Tariff ICC WECJ 202-A.

In summary, consistent with our determination in Jasper Wyman and Roberts & Dybdahl and that of the Court in Kmart, we find that Western did not have an effective power of attorney or concurrence with respect to the Household Goods Carriers' Bureau as required by 49 CFR 1312.4(d) to participate in the HGB Mileage Guide as a common carrier at the time the subject shipments were moved. Thus, Western's mileage tariff rates are void because they fail to provide a means for calculating freight charges, and they may not form the basis for Western's undercharge claims against Temple-Eastex.

B. Section 2(e). Section 2(e)(1) of the NRA provides, in pertinent part, that "it shall be an unreasonable practice for a motor carrier of property . . . providing transportation subject to the jurisdiction of the [Board] . . . to attempt to charge or to charge for a transportation service . . . the difference between the applicable rate that [was] lawfully in effect pursuant to a [filed] tariff . . . and the negotiated rate for such transportation service . . . if the carrier . . . is no longer transporting property . . . or is transporting property . . . for the purpose of avoiding application of this subsection."<sup>7</sup>

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<sup>7</sup> Section 2(e), as originally drafted, applied only to transportation service provided prior to September 30, 1990. Here, we note, the shipments at issue moved before September 30, 1990. In any event, 49 U.S.C. 13711(g), which was enacted in the ICC Termination Act as an exception to the general rule noted in footnote 1 to this decision, deletes the September 30, 1990 cut-off date as to proceedings pending as of January 1, 1996.

It is undisputed that Western is no longer an operating carrier. Accordingly, we may proceed to determine whether Western's attempt to collect undercharges (the difference between the applicable filed rate and the negotiated rate) is an unreasonable practice.

Initially, we must address the threshold issue of whether sufficient written evidence of a negotiated rate agreement exists to make a section 2(e) determination. Section 2(e)(6)(B) defines the term "negotiated rate" as one agreed upon by the shipper and carrier "through negotiations pursuant to which no tariff was lawfully and timely filed . . . and for which there is written evidence of such agreement." Thus, section 2(e) cannot be satisfied unless there is written evidence of a negotiated rate agreement.

Here, the record contains an executed Transportation Agreement between Western and Temple-Eastex under which Western agreed to provide transportation services for Temple-Eastex pursuant to Western's contract carrier authority.<sup>8</sup> The record also contains a listing of the subject shipments submitted in respondent's court complaint, as well as copies of "corrected" freight bills issued by Western indicating originally billed charges, assessed by respondent and paid by petitioner, that were consistently and substantially below those that Western is now seeking to assess.<sup>9</sup> We find this evidence sufficient to satisfy the written evidence requirement. E.A. Miller, Inc.--Rates and Practices of Best, 10 I.C.C.2d 235 (1994). See William J. Hunt, Trustee for Ritter Transportation, Inc. v. Gantrade Corp., C.A. No. H-89-2379 (S.D. Tex. March 31, 1997) (finding that the written evidence need not include the original freight bills, or any other particular type of evidence, as long as the written evidence submitted establishes that specific amounts were paid that were less than the filed rate and that the rates were agreed upon by the parties).

In this case the evidence is substantial that the parties conducted business in accordance with agreed-to negotiated rates. The consistent application in the original freight bills of market-based charges in line with those set forth in the Transportation Agreement, which are significantly below rates that respondent is here attempting to assess, confirms Temple-Eastex's unrefuted testimony and reflects the existence of negotiated rates. The evidence further indicates that petitioner relied upon

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<sup>8</sup> Although we find the nonparticipation and section 2(e) issues dispositive in this proceeding, the existence of the Transportation Agreement and the unrefuted testimony concerning the parties' behavior under it strongly suggest that collection of common carrier tariff rates would be precluded in light of the fact that a contractual relationship did exist between Temple-Eastex and Western. Indeed, the Transportation Agreement attached as Exhibit F to the affidavit of Mr. Bange (with a copy of a rate schedule appended) indicates that contract carrier services were to be performed under Western's contract carrier Permit No. MC-135518 (Sub-No. 35).

<sup>9</sup> Temple-Eastex testifies that the rates it paid pursuant to the Transportation Agreement were comparable to those paid to other carriers for similar services. Thus, it states, it would not have used Western had it known that Western would attempt to collect the above-market rates it is seeking in this proceeding.

the agreed-to rates in tendering its traffic to Western, and would not have used respondent's service had it quoted the above-market rates it now seeks to assess.

In exercising our jurisdiction under section 2(e)(2), we are directed to consider five factors: (1) whether the shipper was offered a transportation rate by the carrier other than a rate legally on file [section 2(e)(2)(A)]; (2) whether the shipper tendered freight to the carrier in reasonable reliance upon the offered rate [section 2(e)(2)(B)]; (3) whether the carrier did not properly or timely file a tariff providing for such rate or failed to enter into an agreement for contract carriage [section 2(e)(2)(C)]; (4) whether the transportation rate was billed and collected by the carrier [section 2(e)(2)(D)]; and (5) whether the carrier or the party representing such carrier now demands additional payment of a higher rate filed in a tariff [section 2(e)(2)(E)].

Here, the evidence establishes that Temple-Eastex was offered negotiated rates by Western; that Temple-Eastex tendered freight in reasonable reliance on the offered rates; that Western billed and collected the negotiated rates; and that Western now seeks to collect additional payment based on higher rates filed in a tariff. Therefore, under 49 U.S.C. 10701(a) and section 2(e) of the NRA, we find that it is an unreasonable practice for Western to attempt to collect undercharges from Temple-Eastex for transporting the shipments at issue in this proceeding.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is discontinued.
2. This decision is effective on its service date.
3. A copy of this decision will be mailed to:

The Honorable Sidney A. Fitzwater  
United States District Court for the  
Northern District of Texas, Dallas Division  
U.S. Courthouse  
1100 Commerce Street, Room 15A3  
Dallas, TX 75242

Re: Civil Action No. 3:92-CV-1172-D

By the Board, Chairman Morgan, Vice Chairman Owen and Commissioner Clyburn.

No. 41113

Vernon A. Williams  
Secretary